December 2006

MJI Publications Updates

Crime Victim Rights Manual (Revised Edition)

Criminal Procedure Monograph 8—Felony Sentencing

Domestic Violence Benchbook (3rd ed)

Michigan Circuit Court Benchbook

Sexual Assault Benchbook

December 2006

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 8

The Crime Victim at Trial

8.14 Former Testimony of Unavailable Witness

C. Defendant's Right to Confront the Witnesses Against Him or Her

Replace the last paragraph on page 264 with the following text:

In *People v Walker*, ___ Mich App ___, ___ (2006),* the defendant repeatedly beat the victim and threatened to kill her. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. Police officers arriving in response to the neighbor's 911 call also questioned the victim. The *Walker* Court concluded that the crime victim's statements to her neighbor and to the police were improperly admitted because they constituted testimonial statements for purposes of the Confrontation Clause. A child-victim's statement to an interviewer at a children's assessment center does not constitute testimonial evidence under *Crawford* and therefore is not barred by the Confrontation Clause. *People v Geno*, 261 Mich App 624, 630–631 (2004).

*Reversing *People v Walker*, 265 Mich App 530 (2005).

CHAPTER 10

Restitution

10.8 Amount of Restitution Required

Insert the following text after the first paragraph in this section near the bottom of page 325:

The amount of restitution ordered may include the cost of labor necessary to determine the value of property lost as a result of a defendant's criminal conduct, as well as the labor costs involved in replacing the lost property. *People v Gubachy*, ___ Mich App ___, ___ (2006).

December 2006

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part II—Scoring the Statutory Sentencing Guidelines

8.5 Scoring an Offender's Prior Record Variables (PRVs)

C. PRV 1—Prior High Severity Felony Convictions

1. Case Law Under the Statutory Guidelines

Insert the following text before the first paragraph in this sub-subsection near the bottom of page 23:

For purposes of scoring an offender's prior record variables, "another state" does not include foreign states. *People v Price*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Language used in MCL 777.51(2) defines a "prior high severity felony conviction" as "a conviction for a crime listed in offense class M2, A, B, C, or D *or for a felony under a law of the United States or another state* corresponding to a crime listed in offense class M2, A, B, C, or D[.]" [Emphasis added.] *Price, supra* at 4. According to the *Price* Court: "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not 'a felony under a law of the United States or another state[.]'" *Price, supra* at 4–5.

Part II—Scoring the Statutory Sentencing Guidelines

8.5 Scoring an Offender's Prior Record Variables (PRVs)

D. PRV 2—Prior Low Severity Felony Convictions

1. Case Law Under the Statutory Guidelines

Insert the following text on page 25 before the existing text in this sub-subsection:

For purposes of scoring an offender's prior record variables, "another state" does not include foreign states. *People v Price*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 2 is the same as the language used in PRV 1—the variable at issue in *Price*. MCL 777.52(2) defines a "prior low severity felony conviction" as "a conviction for a crime listed in offense class E, F, G, or H *or for a felony under a law of the United States or another state* corresponding to a crime listed in offense class E, F, G, or H[.]" [Emphasis added.] According to the *Price* Court: "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not 'a felony under a law of the United States or another state[.]'" *Price, supra* at 4–5.

Part II—Scoring the Statutory Sentencing Guidelines

8.5 Scoring an Offender's Prior Record Variables (PRVs)

E. PRV 3—Prior High Severity Juvenile Adjudications

Insert the following text near the top of page 27 immediately before subsection (F):

For purposes of scoring an offender's prior record variables, "another state" does not include foreign states. *People v Price*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 3 is the same as the language used in PRV 1—the variable at issue in *Price*. MCL 777.53(2) defines a "prior high severity juvenile adjudication" as "a juvenile adjudication for conduct that would be a crime listed in offense class M2, A, B, C, or D if committed by an adult or for conduct that would be *a felony under a law of the United States or another state* corresponding to a crime listed in offense class M2, A, B, C, or D if committed by an adult[.]" [Emphasis added.] According to the *Price* Court: "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not 'a felony under a law of the United States or another state[.]'" *Price*, *supra* at 4–5.

F. PRV 4—Prior Low Severity Juvenile Adjudications

Insert the following text immediately before subsection (G) on page 27:

For purposes of scoring an offender's prior record variables, "another state" does not include foreign states. *People v Price*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 4 is the same as the language used in PRV 1—the variable at issue in *Price*. MCL 777.54(2) defines a "prior low severity juvenile adjudication" as "a juvenile adjudication for conduct that would be a crime listed in offense class E, F, G, or H if committed by an adult or for conduct that would be *a felony under a law of the United States or another state* corresponding to a crime listed in offense class E, F, G, or H if committed by an adult[.]" [Emphasis added.] According to the *Price* Court: "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States.

Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not 'a felony under a law of the United States or another state[.]'" *Price*, *supra* at 4–5.

Part II—Scoring the Statutory Sentencing Guidelines

8.5 Scoring an Offender's Prior Record Variables (PRVs)

G. PRV 5—Prior Misdemeanor Convictions or Prior Misdemeanor Juvenile Adjudications

Insert the following text after the second bullet near the top of page 29:

For purposes of scoring an offender's prior record variables, "another state" does not include foreign states. *People v Price*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). Relevant language used in PRV 5 is the same as the language used in PRV 1—the variable at issue in *Price*. MCL 777.55(3)(a) defines "prior misdemeanor conviction" as "a conviction for a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States[.]" MCL 777.55(3)(b) defines "prior misdemeanor juvenile adjudication" as "a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States[.]" According to the *Price* Court: "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not 'a felony under a law of the United States or another state[.]'" *Price*, *supra* at 4–5.

Part III—Recommended Minimum Sentences for Offenders Not Sentenced as Habitual Offenders

8.9 Felony Offenses Enumerated in MCL 777.18 (Offenses Predicated on an Underlying Felony)

B. Subsequent Controlled Substance Violations—MCL 333.7413(2) or (3)

Insert the following text before the **Note** at the top of page 89:

"Another state" for purposes of MCL 777.51(2) (one of the statutory instructions for scoring prior record variable 1 under the sentencing guidelines) does not include foreign states. *People v Price*, 477 Mich 1, 5 (2006) (the defendant's previous conviction in Canada was improperly counted for purposes of PRV 1). The Court's reasoning for its interpretation of "another state" as used in MCL 777.51(2) likely applies to the language used in MCL 333.7413(5) to define second or subsequent offenses. MCL 333.7413(5) states:

> "[A]n offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted *under this article or under any statute of the United States or of any state* relating to a narcotic drug, marihuana, depressant, stimulant, or hallucinogenic drug." [Emphasis added.]

According to the *Price* Court: "The common understanding of 'state' in Michigan law is a state of the United States, not a province of Canada and not a foreign state. Obviously, Michigan is one of the states that comprise the United States. Thus, the most obvious meaning of 'another state' in this context is one of the states, other than Michigan, that comprise the United States. A Canadian conviction is not 'a felony under a law of the United States or another state[.]'" *Price*, *supra* at 4–5.

Part VII—Fines, Costs, Assessments, and Restitution

8.37 Restitution

Insert the following text after the first paragraph on page 169:

The amount of restitution ordered may include the cost of labor necessary to determine the value of property lost as a result of a defendant's criminal conduct, as well as the labor costs involved in replacing the lost property. *People v Gubachy*, ___ Mich App ___, ___ (2006).

Part IX—Sentence Departures

8.50 Upward Departures

B. Factors Involving the Offender

Insert the following text before the penultimate paragraph near the bottom of page 205:

A defendant's prior conviction in a foreign state—*not* one of the United States—is not properly counted under any of the prior record variables; therefore, under appropriate circumstances and subject to the requirements in *People v Babcock*, 469 Mich 247 (2003), a foreign conviction may constitute a substantial and compelling reason for departure from the guidelines range. *People v Price*, 477 Mich 1, 5–6 (2006).

December 2006

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.3 Audiotaped Evidence

B. Hearsay Objections to Audiotaped Evidence

2. Excited Utterance Exception Under MRE 803(2)

In *People v Walker (Walker II)*, ___ Mich App ___, ___ (2006), the Michigan Court of Appeals, on remand from the Michigan Supreme Court, reversed its prior holding in *People v Walker (Walker I)*, 265 Mich App 530 (2005), on the ground that the written statements of the victim and her neighbor constituted "testimonial statements" for purposes of the Confrontation Clause.

Accordingly, delete the April 2005 update to page 168 and replace it with the following case summary:

In *People v Walker (Walker I)*, 265 Mich App 530, 532 (2005), the defendant beat his live-in girlfriend with a stick and threatened to "blow her back out" with a handgun. Two hours after the beatings had stopped, the victim jumped from a second-story balcony, ran to a neighbor's house, and asked the neighbor to call the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim also made a written statement to the police. *People v Walker (Walker II)*, ___ Mich App ___, ___ (2006). The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. On appeal, the defendant argued that the statements should not have been admitted because of the two-hour delay between the assault and the victim's escape, during which time the victim fell asleep and had time to "compose herself enough to jump from a second story window." *Walker I, supra* at 533. The defendant also argued that this delay provided the victim with time to fabricate the assault. The Court of Appeals rejected the defendant's argument and upheld the admission of the statements as "excited utterances." *Id*. at 534–535. The Court of Appeals reiterated the Michigan Supreme Court's holding

in *People v Smith*, 456 Mich 543, 551 (1998), that there is no express time limit for excited utterances: the focus is on whether the declarant was still under the stress of the event at the time the statement was made. The Court found that the facts of this case, including the testimony of the neighbor and police officer that the victim was upset, crying, shaking, and hysterical, supported the trial court's determination that the statements were properly admitted. *Walker I*, *supra* at 534–535.

The Court of Appeals also found that the crime victim's statements made to the neighbor and police officer did not constitute "testimonial statements" for the purposes of the Confrontation Clause. *Walker I*, *supra* at 535. Subsequently, however, the Michigan Supreme Court vacated the holding of the Court of Appeals in *Walker I* as to the Confrontation Clause issue, and remanded the case to the Court of Appeals for reconsideration in light of the newly decided case of *Davis v Washington*, 547 US ___, ___ (2006). *People v Walker*, 477 Mich 856, 856 (2006). On remand, the Court of Appeals found that the statements made during the 911 call were not testimonial in nature because they were made for the purpose of resolving an existing emergency. However, the Court found that both the neighbor's written statement to the police and the victim's own statement to the police constituted "testimonial statements" for purposes of the Confrontation Clause. On this basis the Court of Appeals reversed its prior holding in *Walker I*, and remanded the case to the trial court for further proceedings as appropriate.

December 2006

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.33 Scientific Expert Testimony

L. Court Appointed Expert

Insert the following case summary after the second paragraph in this subsection on page 91:

To obtain the appointment of an expert witness, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. *People v Carnicom*, ___ Mich App ___, ___ (2006). Moreover, it is not enough that the defendant shows a mere possibility of assistance from the requested expert. Without some showing by the defendant that the expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Id*.

In *Carnicom, supra*, the defendant requested that the court authorize funds to conduct an independent test of the defendant's blood sample. The defendant asserted that this witness would be able to offer testimony to explain away the presence of an illegal substance in defendant's bloodstream at the time of his arrest. However, the defendant made no showing that the expert testimony would likely benefit him. The trial court, on this basis, denied defendant's request for funds for the expert witness. On appeal, the Court of Appeals held that absent some showing by the defendant that the expert testimony would likely benefit the defense, a trial court does not abuse its discretion. In light of the defendant's failure to demonstrate that the requested expert's testimony

would likely benefit him, the Court found that the trial court had not abused its discretion when it denied defendant's request for funds.

CHAPTER 2

Evidence

Part IV—Hearsay (MRE 804 Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

In *People v Walker (Walker II)*, ___ Mich App ___, ___ (2006), the Michigan Court of Appeals, on remand from the Michigan Supreme Court, reversed its prior holding in *People v Walker (Walker I)*, 265 Mich App 530 (2005).

Accordingly, delete the April 2005 update to page 112 concerning *Walker I* and insert the following case summary after the July 2006 update to page 112:

Statements made by the neighbor of a victim during a 911 call, which statements were made for the purpose of obtaining assistance for the victim, do not constitute "testimonial statements" for purposes of the Confrontation Clause. *People v Walker (Walker II)*, ___ Mich App ___, ___ (2006). The neighbor's written statement regarding the information the victim provided to her, however, as well as the victim's written statement, do constitute "testimonial statements" for purposes of the Confrontation Clause when there is no indication that a continuing danger to the victim existed at the time these written statements were made.

In *Walker*, the defendant beat the victim and threatened to kill her. *Walker II*, *supra* at ___. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim also made a written statement to the police. The victim did not appear for trial, and all of these statements were admitted under the excited utterance exception to the hearsay rule. On appeal, the defendant argued that pursuant to *Crawford v Washington*, 541 US 36 (2005), admission of these statements violated the Confrontation Clause because they were "testimonial statements." The Court of Appeals, however, rejected the defendant's argument. *Walker I, supra* at 533. Subsequently, however, the Michigan Supreme Court vacated the holding of the Court of Appeals in *Walker I* as to the Confrontation Clause issue and remanded the case to the Court of Appeals for reconsideration in light of the newly decided case of *Davis v Washington*, 547 US ___, ___ (2006). *People v Walker*, 477 Mich 856, 856 (2006). On remand, the Court of Appeals found that the statements made during the 911 call were not testimonial in nature because they were made for the purpose of resolving an existing emergency. *Walker II*, *supra* at ___. However, the Court found that the neighbor's written statement to the

police and the victim's own statement to the police both did constitute "testimonial statements" for purposes of the Confrontation Clause. The Court reasoned that there was no indication of continuing danger at the time these statements were made:

> "[T]he victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events began and progressed.[Citation omitted.] Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are generally testimonial under the standards set forth in *Davis*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime . . . ". *Walker II, supra* at ___.

On this basis the Court of Appeals reversed its prior holding in *Walker I*, and remanded the case to the trial court for further proceedings as appropriate. *Walker II, supra* at ___.

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the January 2006 update to page 415:

In light of *Davis v Washington*, 547 US ___ (2006), and *Crawford v Washington*, 541 US 36 (2005), the Court of Appeals reversed an earlier ruling* and concluded that a crime victim's statements to a neighbor and a police officer were improperly admitted because they constituted "testimonial statements" for purposes of the Confrontation Clause, and the defendant had not had an opportunity to cross-examine the victim. *People v Walker (Walker II)*, ___ Mich App ___, ___ (2006). In *Walker*, the defendant beat the victim and threatened to kill her. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule.

**People v Walker*, 265 Mich App 530 (2005).

Because the circumstances in *Walker* were substantially similar to the circumstances in *Davis, supra,* and the companion case to *Davis*, *Hammon v Indiana,* the Court concluded that a similar outcome was warranted. As did the United States Supreme Court in *Davis*, the *WalkerII* Court determined that the content of the 911 call was nontestimonial evidence properly admitted at trial because the operator's questioning "was directed at eliciting further information to resolve the present emergency and to ensure that the victim, the neighbor, and others potentially at risk . . . would be protected from harm while police assistance was secured." *WalkerII, supra* at ___.

The *Walker II* Court further concluded that "[u]nlike the 911 call, the victim's written statement recorded by her neighbor, and her statements to the police at the scene, [we]re more akin to the statements in *Hammon*, which the *Davis* Court found inadmissible under the Confrontation Clause." *Walker II, supra*, at ___. The Court explained:

> "As in *Hammon*, where the police questioned the domestic assault victim separately from her husband and obtained her signed affidavit of the circumstances of the assault, in this case, the police questioning first occurred in the neighbor's home, and there is no

> indication of a continuing danger. Rather, the victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events began and progressed. *Davis, supra* at 2278. Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are generally testimonial under the standards set forth in *Davis*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime—which is, of course, precisely what the officer[s] *should* have done.' *Davis, supra* at 2278. Accordingly, the victim's written statement and her oral statements to the police are inadmissible." *Walker, supra* at ___.

The Court determined that the error in admitting the testimonial statements was not harmless and remanded the case for further proceedings.

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.49 Jury Deliberation

C. Hung Jury

Insert the following text after the January 2006 update to page 436:

When a trial court's supplemental instruction to a deadlocked jury represents a substantial departure from ABA standard jury instruction 5.4* and the result of the instruction is coercive, reversal is required. *People v Rouse*, ___ Mich App ___, ___ (2006). In *Rouse*, the trial court prefaced its nearly verbatim delivery of CJI2d 3.12—Michigan's standard deadlocked jury instruction—with a supplemental instruction that substantially departed from ABA jury instruction 5.4. In part, the trial court's supplemental instruction stated:

> "But in considering everything that I will read to you, also consider that if you are not truly able to reach an agreement on this in compliance with the instruction that I will give you, it will result in everybody coming back, the victim and the defendant included, and going through this entire process again with another jury. That is a difficult situation. It is, it is, you know, in terms of the justice that we are rendering in this case, I think is somewhat compromised if we are unable to reach a verdict one way or the other in this case." *Rouse, supra* at ___.

Considering the trial court's supplemental instruction "in the factual context in which it was given," the Court of Appeals determined that the instruction was coercive for several reasons. The *Rouse* Court noted that the trial court's suggestion that justice would be compromised and "everybody" would have to return and repeat the entire process "contained the message that a failure to reach a verdict constitute[d] a failure of purpose and tended to pressure the jury to reach a unanimous verdict as part of its civic duty." *Rouse, supra* at ___. The Court further noted that the trial court's instruction "included language indicating that if the jury did not reach a verdict, the victim would be subjected to another trial . . . language that, in effect, pressured the jury to make a decision based on emotion or sympathy for the minor victim."

*The supplemental instruction adopted by the Michigan Supreme Court in *People v Sullivan*, 392 Mich 324, 341–342 (1974).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

D. Imposition of Sentence

9. Restitution

Insert the following text after the second paragraph in this sub-subsection on page 453:

The amount of restitution ordered may include the cost of labor necessary to determine the value of property lost as a result of a defendant's criminal conduct, as well as the labor costs involved in replacing the lost property. *People v Gubachy*, ___ Mich App ___, ___ (2006).

December 2006

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

G. "Commission of Any Other Felony"

4. The Sequence or Timing of the "Other Felony"

Insert the following text immediately before subsection (H) on page 64:

MCL 750.520b(1)(c) requires only that the sexual penetration occur "under circumstances involving the commission of any other felony"; the statutory language "does not necessarily demand that the sex act occur *during* the commission of the felony" but the statute "does require a direct interrelationship between the felony and the sexual penetration." *People v Waltonen*, ___ Mich App ___, ___ (2006) [emphasis added]. In *Waltonen*, the defendant claimed that he supplied the complainant with Oxycontin, a schedule 2 controlled substance, and in exchange, the complainant engaged in consensual sex with him. The defendant argued that MCL 750.520b(1)(c) did not apply because the delivery of Oxycontin did not occur during the sex act. Citing with approval *People v Jones*, 144 Mich App 1 (1985), the *Waltonen* Court noted:

> "Here, the delivery of controlled substances technically occurred after the sexual acts; however, the sexual acts were directly interrelated to the delivery of the drugs as the only reason the victim engaged in sexual penetration was to acquire the drugs. Stated somewhat differently, delivery of the drugs was part and parcel of the act of sexual penetration. Before and during the sexual penetration, the victim and defendant were operating under the knowledge and expectation that drugs would be delivered to the victim after the sexual act and only because of the sexual act. There existed a continuum of interrelated events." *Waltonen, supra* at ___.

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Replace the April 2005 update to page 364 with the following:

**People v Walker*, 265 Mich App 530 (2005).

In light of *Davis v Washington*, 547 US ___ (2006), and *Crawford v Washington*, 541 US 36 (2005), the Court of Appeals reversed an earlier ruling* and concluded that a crime victim's statements to a neighbor and a police officer were improperly admitted because they constituted "testimonial statements" for purposes of the Confrontation Clause, and the defendant had not had an opportunity to cross-examine the victim. *People v Walker (Walker II)*, ___ Mich App ___, ___ (2006). In *Walker*, the defendant beat the victim and threatened to kill her. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule.

Because the circumstances in *Walker* were substantially similar to the circumstances in *Davis*, *supra*, and the companion case to *Davis*, *Hammon v Indiana*, the Court concluded that a similar outcome was warranted. As did the United States Supreme Court in *Davis*, the *Walker II* Court determined that the content of the 911 call was nontestimonial evidence properly admitted at trial because the operator's questioning "was directed at eliciting further information to resolve the present emergency and to ensure that the victim, the neighbor, and others potentially at risk . . . would be protected from harm while police assistance was secured." *Walker II*, *supra* at ___.

The *Walker II* Court further concluded that "[u]nlike the 911 call, the victim's written statement recorded by her neighbor, and her statements to the police at the scene, [we]re more akin to the statements in *Hammon*, which the *Davis* Court found inadmissible under the Confrontation Clause." *Walker II*, *supra* at ____. The Court explained:

> "As in *Hammon*, where the police questioned the domestic assault victim separately from her husband and obtained her signed affidavit of the circumstances of the assault, in this case, the police questioning first occurred in the neighbor's home, and there is no indication of a continuing danger. Rather, the victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events began and progressed. *Davis, supra* at 2278. Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are

> generally testimonial under the standards set forth in *Davis*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime—which is, of course, precisely what the officer[s] *should* have done.' *Davis, supra* at 2278. Accordingly, the victim's written statement and her oral statements to the police are inadmissible." *Walker II, supra* at ___.

The Court determined that the error in admitting the testimonial statements was not harmless and remanded the case for further proceedings.